IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 89 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)

Versus

CHAMPAKLAL & BROS. - Respondent(s)

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Appearance :
MR BB NAIK for Applicant(s) : 1,
SERVED BY RPAD - (N) for Respondent(s) : 1,
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 28/09/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench “C” has referred the following question under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax :

> “Whether the appellate Tribunal is right in law and on facts in deleting the addition of Rs.2,77,000/- made by the assessing officer holding that the provisions of section 41(1) or section 28(iv) are not applicable when the assessee had received the above amount which was written of as waived liability?”

2. Heard Mr.B.B.Naik, the learned standing counsel for the applicant revenue. Though served, none appears for the respondent assessee.

3. The assessment year is 1985-86 and the relevant accounting period is Samvat Year 2040. The assessee firm is carrying on business of colour chemicals and trading in cloth. For the purposes of its business, it had been borrowing money from one M/s T.C. & Co., right from the year 1969. During the relevant accounting year, various cheques totalling to Rs.7,25,000/- were

given by the assessee, but were returned by the bank and hence, the lender M/s T.C. & Co. filed a suit for recovery of the amount of Rs.7,25,000/- along with the interest till the date of the suit amounting to Rs.88,730/-. Ultimately, the parties arrived at a compromise and the lender accepted an amount of Rs.4,50,000/- in full and final settlement of the claim.

4. In Part III of the Return of Income, the assessee disclosed a sum of Rs.2,77,000/- being waiver of liability by M/s T.C. & Co. on account of court settlement and claimed that the amount was not taxable. The assessing officer negatived the claim and brought the amount to tax under section 41(1) of the Act. The assessment order came to be confirmed by the Deputy Commissioner of Appeals. After considering the account of M/s T.C. & Co. in the books of the assessee, it was found by him that the account was more in the nature of a current account with day to day deposits and withdrawals, including interest as and when there was an over-draft in the account. That the debit balance at the end of the year was the result of loan returned by the assessee as well as interest payments. He also

found that the assessee had claimed interest on the loans as allowable expenditure and had been accordingly granted deduction of such interest expenditure from time to time in earlier assessment years.

5. When the matter was taken by way of second appeal before the Tribunal, on behalf of the assessee, it was contended that the Deputy Collector was clearly wrong in stating that the assessee had been claiming interest on the loan as allowable expenditure. That the interest on the outstanding balances had never been credited to the lender firm and had not been claimed by the assessee. That the case was in relation to the claim of the principal sum and section 41(1) of the Act had no application.

6. On behalf of the revenue, it was submitted that the assessing officer had erred in referring to Section 41(1) of the Act, while, in fact, the disallowance had been made actually under Section 28(iv) of the Act.

7. The Tribunal has observed as follows in paragraph No.5 of its impugned order dated 10/7/1992 :

> “5. It is quite clear that section 41(1) is not at all applicable in this case. The amount in respect of which the waiver has taken place has not been claimed as a deduction. .....”
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> “.... This clearly shows that the amount which was waived also contained the element of interest amount. The assessee's representative vehemently argued that interest has never been credited by the assessee and that, therefore, there was no question of the compromise containing any interest therein. However, as stated above, the perusal of the plaint and the compromise really shows that the waiver does contain the element of interest. .... “

8. Thus, it is apparent that, on the same set of facts, the Tribunal has recorded contrary findings and there is no material available on record to show as to which of the findings is correct, one way or the other. In these circumstances, it is not possible to answer the question referred to this Court in absence of proper findings of fact after appreciation of evidence on record. This is all the more necessary in light of the findings of the Deputy Commissioner of Appeals and the challenge to the same by the assessee, as recorded by

the Tribunal in para No.3 of its order. The Tribunal may also bear in mind that the Income Tax Officer had no where invoked Section 28(iv) of the Act. The finding of the Tribunal that the assessment order shows that the assessing officer had invoked provisions of Section 28(iv) of the Act, while actually mentioning section 41(1) of the Act, is not borne out from the facts and circumstances.

9. In these circumstances, the question referred for the opinion of this Court cannot be answered in absence of proper findings of fact recorded by the Tribunal. Accordingly, the question is left unanswered and the reference is returned to the Tribunal for deciding issue afresh after hearing both the sides.

10. The reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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